United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

ORIGINAL

76-1504

76-1505

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P/S

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

ROGER L. SPINELLI AND JOHN J. DELUCIA,

Appellants.

On Appeal From The United States District Court For The District of Connecticut

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The Appellants, Roger L. Spinelli and John J. DeLucia, pursuant to Rule 40 of the Federal Rules of Criminal Procedure, hereby petition the United States Court of Appeals For The Second Circuit for a rehearing of its judgment, dated February 22, 1977, affirming the conviction of said Appellants on federal gambling indictments under Title 18 U.S.C. §§ 1955 and 2.

It is respectfully submitted that the Court has overlooked or misapprehended the fact, and law pertaining thereto, that the Motions to Suppress of Appellants, Roger L. Spinelli and John J. DeLucia, were not pending after October 24, 1972.

A R G U M E N T

This matter was orally argued before this Court on February 22, 1977. The Appellants, Roger L. Spinelli and John J. DeLucia, in their brief, reply brief, and at oral argument contended that upon the record herein they were entitled to have the indictments against them dismissed in that the government was not ready for trial within six months of the dates of their arrest as required by Rule 4 of the District of Connecticut's Plan for Achieving Prompt Disposition of Criminal Cases. (So-called Six Months' Rule)

This court, at oral argument, entered a judgment affirming Appellants' convictions upon a finding by it that Appellants' suppression motions were pending after October 24, 1972.

As indicated in their brief (p. 19), the Appellants, Roger L. Spinelli and John J. DeLucia, filed motions to suppress on August 8, 1972, and August 22, 1972, respectively. Those motions were marked "OFF WITHOUT PREJUDICE" on October 24, 1972,[1] (Zampano, J.). On October 20,

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[1] Appellants' brief incorrectly states, at page 19, that such motions were marked "OFF WITHOUT PREJUDICE" on March 6, 1973. All motions not previously marked "OFF WITHOUT PREJUDICE", on October 24, 1972, or which were filed after such date were also marked "OFF WITHOUT PREJUDICE" on March 6, 1973. Appellants' motions to suppress were not marked "OFF WITHOUT PREJUDICE" both on October 24, 1972, and March 6, 1973, as suggested by the government at pages 6 & 7 of its brief.

1975, in hearing the Appellants' Motion to Dismiss under the Six Months' Rule, the court (Zampano, J.) specifically found that there "would be no motions pending as of the date when I stated that all motions were off." (emphasis added) (App. 314).

Despite the Appellants' motions to suppress being marked "OFF WITHOUT PREJUDICE", on October 24, 1972, and despite the court (Zampano, J.) specifically finding that after such a marking those motions were no longer pending under the Six Months' Rule, this court found at oral argument that Appellants' motions to suppress were pending from October 24, 1972, until November 12, 1973.

The District Court (Zampano, J.), on March 15, 1976, stated that "whoever reviews this case should review it on the cold record, because that's what /the appellants/ are entitled to." (emphasis added) (App. 526). Clearly, on the record no motions of the Appellants were pending from March 20, 1973, until June 29, 1973, or from July 23, 1973, until November 12, 1973. (See Appellants' brief, page 9).

The District Court's request that this court review this case on the cold record was made after the following observations of the District Court on March 15, 1976:

THE COURT: The Court has some preliminary observations that it wishes to place on the record with respect to the Balog and Spinelli cases. (App. 508)

:

I recall numerous in chambers conferences with the attorneys. The attorneys were going in and out of this case -- these cases throughout their history. I remember particularly one long conference that I had with the attorneys in chambers and there was very little question in my mind that the Government's interpretation of what we were doing there in that period of time is the correct one.

Now, with respect to the Balog case, I have no difficulty at all. I think even the bare record demonstrates that the Government is entitled to have the motion to dismiss denied. I think the record is much clearer in that case. The time spans are set out in the briefs and I do find that motion to dismiss in that case should be denied.

Spinelli is more troublesome. But I find that again the Government's interpretation is the one I should adopt. While it is true that certain motions do not appear on the record to be pending, there is not the slightest doubt in my mind that whenever we talk in chambers that counsel assumed with the court as well as with the Government that these motions were to be filed and I should know that. (App. 510, 511)

Obviously, the District Court (Zampano, J.) predicated its ruling on the motion to dismiss under the Six Months' Rule on the assumption that counsel for the Appellant, Roger L. Spinelli, was present in the chambers conferences referred to above. In fact, counsel for the Appellant, Roger L. Spinelli, was not present at such conferences as shown by the following colloquy that followed the remarks of the court referred to hereinabove:

MR. ROSNICK: May I make a few comments for the record on your rulings on the six month rule?

As far as Spinelli is concerned, I only recollect one conference with your Honor in chambers and that was subsequent to the decision in Giordano and Chavez and when you asked for lead counsel be appointed and any motions that the file be filed on a consolidated basis. (App. 518)

THE COURT: Weren't you at the conference where we discussed for three hours --

MR. ROSNICK: Excuse me --

THE COURT: --what we were going to do with the signatures and depositions?

MR. ROSNICK: Excuse me, your Honor, there was also a conference where four or five counsel were present and the question of whether the signature was authenticated, and that again was subsequent to the Giordano and Chavez decision, and I think it was sometime in 1975.

THE COURT: One thing that is very distressing is when the Court has a recollection contrar to counsel's, and I respect your judgment, but I think we had that conference, we had more than one conference, and I remember having two or three conferences just on counsel for Mihigel.

MR. MEEHAN: Your Honor is correct.

THE COURT: Counsel were going in and out of my chambers during that period of time --

MR. MEEHAN: Your Honor is correct. What the problem is that I can remember being at several conferences in your chambers and not all counsel were there, so I think that --

THE COURT: As I say, I am not putting this onus on the defendants. In fact, of the three parties involved, the Court takes primary responsibility,

the Government second, and the defendants are a very weak third as far as being responsible for the delay. So I am the first to take full responsibility for the fact that I did see counsel in chambers on occasion when Mr. Tarrant would say, "I have a couple of attorneys here in Balog and Spinelli, and I want to see you", and I am frank to confess I never did sit down and say, "Let's make notes", or, "Is every single attorney here present who has an appearance in the case?" and there may have been times when I assumed, perhaps wrongly, that certain attorneys were really handling the procedural aspects of these cases with the Court, and that there was no need to have each and every Court-appointed attorney here.

Whatever result I may have, and whatever effect that may have from a legal point of view, in my opinion, it's not enough to grant the motion to dismiss.

On the other hand, another forum may hav a different view. That is why I am putting on the record that you may be right in your recollection. It's contrary to mine, but that may be because you weren't there.

MR. ROSNICK: For the record, if your Honor please, as counsel for Roger Spinelli, I think Mr. Spinelli has had a leading position in this trial, and his counsel has had a lead position in this trial, and I believe I have attended every conference or every hearing on every motion that in any way pertained to Roger Spinelli. I don't believe I missed any conferences and again the only meeting with your Honor that I recollect or any meeting that I recollect with your Honor in chambers were following the Giordano and Chavez decision. (App. 519-521)

Subsequent discussion on the record that day demonstrated that the chambers conferences prior to Giordano and Chavez decisions referred to by Judge Zampano did not even involve the Appellant, Roger L.

Spinelli. (App. 523-525). Further, counsel for such Appellant was not present. (App. 525). Upon being informed that, in fact, counsel for the Appellant, Roger L. Spinelli, was not present at those chambers conferences as he had assumed, Judge Zampano, stated:

> THE COURT: But in any event, Mr. Rosnick, you have every right to protect your client, and you are an excellent attorney, and I commend you for it. But I am sorry I do not have notes. I did not make notes myself.
>
> Many times these conferences occurred when I was in the middle of a long case and I would see counsel on the spur of the moment.
>
> On the other hand, it seems to me that it should not come down to your word against mine for a decision. I think in fairness to you, whoever reviews this case should review it on the cold record because that's what you are entitled to. (emphasis added) (App. 525-526).

Clearly, the District Court did not find that the Appellant, Roger L. Spinelli, was bound by matters that took place without his knowledge or consent at chambers conferences that did not involve him. Rather, the District Court adopted the "cold record" as its finding. Based thereon, the Appellants, Roger L. Spinelli and John J. DeLucia, have accrued 268 and 300 days, respectively, under the Six Months' Rule.

Despite the District Court stating that in "fairness" to the Appellants this court should review this case "on the cold record", this

court, at oral argument on February 22, 1977, ignored the "cold record" which indicated that the suppression motions were no longer pending after October 24, 1972.

On July 23, 1973, the District Court (Zampano, J.) acknowledged that in order for the court to consider suppression motions they would have to be "filed". (App. 676, 677). (See Brief of Appellants, Roger L. Spinelli and John J. DeLucia, p. 20). Unless and until the Appellants filed motions to suppress after October 24, 1972, it is a certainty that the court would not have and could not have considered them.[2]

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[2] On September 25, 1972, (App. 82, 83), at a pretrial hearing, the court, in colloquy with Attorney Meehan, made it perfectly clear that upon a motion being marked "off without prejudice" it would not be heard by the court until, and if, it was properly refiled:

THE COURT: You have filed a motion for bill of particulars?
MR. MEEHAN: Yes, I have, your Honor. And I filed a motion for discovery and a motion to dismiss.
THE COURT: Have you straightened out with Mr. Tarrant as far as discovery?
MR. MEEHAN: With the exception of one or two, your Honor. But could I just ask the Court this? It is agreeable to the Government, and I would like to have my motion to dismiss the indictment go off without prejudice at this time. And there is no objection by the Government. May that be done, your Honor?
THE COURT: All right.
MR. MEEHAN: Secondly, on the motion for discovery--
THE COURT: Well, just on the motion to dismiss -- in case you weren't here when we dealt with this earlier this morning -- those motions should be submitted within a week after the Government has complied with the disclosure. In other words, they are not going off with leave to renew at any time. They can be renewed within a week after the Government has complied with disclosure orders; so that once you see the basis for attacking the indictment you will file your motion.
...

Clearly, there could not be a suppression motion "pending" under the Six Months' Rule until it was filed. (See Appellants' Brief, pp. 20, 21).

It is perplexing to Appellants, Roger L. Spinelli and John J. DeLucia, when the government refuses to concede that their motions to suppress were no longer pending after October 24, 1972, when they were marked "off without prejudice". This is particularly so considering that the government, in companion case No. 1504, in fact conceded that no motions were pending therein after March 6, 1973, when motions were similarly marked "off without prejudice",

> "The defendants next claim the period between March 6, 1973, and June 27, 1973, a period of 113 days (the defendants claim 111 days). While the Court, on March 6, granted a defense motion for an extension of time to file additional motions, which the government would argue further tolled the period under Rule 5(b), we have thus been unable to determine the extent of the requested continuance and, therefore, accept the period of 113 days as chargeable against the government." (App. 290, 291)

At oral argument, this court made certain comments in regard to Appellants' "waiver" of rights under the Six Months' Rule. The court's attention is respectfully directed to arguments made at pages 3 and 4 of Appellants' Reply Brief in regard thereto. Suffice

it to say that the government at no time claimed "waiver" by the Appellants in the court below, and the District Court never found any such "waiver". Appellants do not believe this court entered judgment on February 22, 1977, on a "waiver" theory. Such a theory must be rejected on constitutional grounds. As stated in Barker v. Wingo, 407 U.S. 514, 525-26, 92 S.Ct. 2182, 2189, 33 L.Ed. 2d 101 (1972):

> "Courts should 'indulge every reasonable presumption against waiver', Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393, 57 S.Ct. 809, 81 L.Ed. 117 (1937), and they should 'not presume acquiescence in the loss of fundamental rights'. Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307, 57 S.Ct. 724, 81 L.Ed. 1093 (1937)."

See U. S. v. Didier, 401 F. Supp. 4, 7 (S.D. N.Y. 1975)

C O N C L U S I O N

The Appellants respectfully submit that this Court, in finding Appellants' suppression motions pending after October 24, 1972, overlooked or misapprehended the District Court's finding that no motions would be pending as of the time they were marked "off". In addition, the District Court found that Appellants were entitled to have this matter reviewed by this court on the "cold record" in "fairness" to the Appellants. This court failed to do so. It is respectfully submitted that procedural due process and fundamental fairness would dictate that the District Court, rather than this court, make the factual findings in regard to the Six Months' Rule.

WHEREFORE, Appellants respectfully request that this court should vacate the judgments herein and remand to the District Court for a hearing on Appellants' motion to dismiss and for a specific finding in regard to when Appellants' motions to dismiss were pending under the Six Months' Rule. See United States v. Scafo, 470 F.2d 748 (2nd Cir. 1972); United States v. Pollack, 475 F.2d 828 (2nd Cir. 1973).

Such a remand can only have a just result. In the event the District Court finds that, in fact, Appellants' suppression motions were

pending after October 24, 1972, then the Appellants' convictions will be justly imposed. However, in the event the District Court finds that Appellants' suppression motions were not, in fact, pending after October 24, 1972, then Appellants' indictments would be justly dismissed. Appellants do not request compassion, pity, or mercy. They merely request their proper day in court.

Respectfully submitted,

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STATE OF NEW YORK)
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COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 28 day of ~~Jan.~~ Feb. 1977 deponent served the within Brief upon

Sidney M. Glazer, Esq.

attorney(s) for

Respondent

in this action, at

U.S. Dept. of Justice, Washington, D.C. 20530

the address(es) designated by said attorney(s) for that purpose by depositing 3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this 28 day of Feb. 1977

WILLIAM BAILEY
Notary Public, State of New York
No. 43-013[illegible]45
Qualified in Richmond County
Commission Expires March 30, 1978